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CASE NO.: _____

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1984

MIGUEL M. TAPIA,

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent.

Petition for a Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit

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42 pp

QUESTIONS PRESENTED FOR REVIEW

WHETHER THE DECISION BELOW REPRESENTS A DEPARTURE BY THE ELEVENTH CIRCUIT COURT OF APPEALS FROM THE SACROSANCT REASONABLE DOUBT STANDARD AND PRESENTS AN IMPORTANT QUESTION OF FEDERAL LAW REGARDING WHETHER, EVEN UNDER ARGUABLY SUSPICIOUS CIRCUMSTANCES, PROOF OF A DEFENDANT'S RECEIPT OF CONTRABAND IN AN OPAQUE CONTAINER IS SUFFICIENT TO ESTABLISH BEYOND A REASONABLE DOUBT THE DEFENDANT'S CRIMINAL KNOWLEDGE THAT THE CONTAINER CONTAINED CONTRABAND.

PARTIES TO THE PROCEEDING IN THE COURT BELOW

United States of America
Miguel Martin Tapia
Ned Edwards

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OPINION BELOW

The Opinion of the lower court, appended hereto in its entirety, is not yet reported.

JURISDICTION

The Judgment of the Court of Appeals for the Eleventh Circuit affirming the Petitioner's conviction was entered on August 3, 1984. On September 4, 1984, the Eleventh Circuit denied the Petitioner's Petition for Rehearing and Rehearing En Banc.

The jurisdiction of the Court is invoked pursuant to 28 U.S.C., Section 1254(1) and Supreme Court Rule 20.

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

U.S. Const., Amendment V:

> No person shall . . . be deprived of life, liberty, or property, without due process of law; . . .

21 U.S.C., Section 841(a)(1):

> . . . It shall be unlawful for any person knowingly or intentionally --

(1) to . . . possess with intent to . . . distribute . . . a controlled substance . . .

STATEMENT OF THE CASE

On the afternoon of July 6, 1983, an agent of the United States Customs Service received information from a confidential informant. The informant stated that the Petitioner would arrive at the Eastern Airlines arrival area of the Miami International Airport at approximately 3:30 P.M. and that he would receive approximately 80 kilograms of cocaine from an Eastern Airlines baggage handler. A physical description was given of the Petitioner and the vehicle in which he was to arrive.[1] Acting on the information, various federal agents and local police officers proceeded to the scene. The Petitioner was located and surveilled.

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[1]No evidence was presented to the jury concerning the substance of the information the police had received prior to initiating their surveillance. This testimony was elicited by the Government only at the hearing held on the Petitioner's motion to suppress.

Surveillance of the Petitioner was initiated outside Concourse B of the Eastern Airlines terminal at the Miami International Airport. The Petitioner was observed sitting on a bench until 4:18 P.M. and later walking away from the bench into a parking garage area. After walking five to ten feet, the Petitioner stopped and looked toward the terminal building as co-defendant Ned Edwards, an Eastern Airlines skycap, was pushing a baggage cart loaded with suitcases from the terminal in the direction of the Petitioner. The Petitioner walked across the street, entered a parking area, stopped at a 1972 Pontiac Bonneville, and opened the trunk of the vehicle. Edwards approached the car to which Tapia had walked and started to unload the four suitcases from his cart into the trunk of the vehicle. The bags appeared to be heavy.

Thereupon, various agents converged on

the Petitioner and co-defendant Edwards, identified themselves, and ordered the defendants to stop what they were doing. One of the suitcases had become partially unlatched allowing the officers to see inside. They observed several round packages, wrapped in contact paper and masking tape, approximately four to five inches in diameter, inside the suitcase. To the officers, the bundles appeared similar to packages of cocaine they had seen in other cases. Based on prior experience, the officers reached the conclusion that "they possibly contained cocaine."

The tape surrounding the packages in the suitcases was opaque. There was no residue visible and no odor apparent. Until the packages within the suitcase were actually opened, their contents were not known to the police. The outer wrappings of all of the packages of cocaine were removed and

inspected for fingerprints. No fingerprints were found of either the Petitioner or co-defendant Edwards.

Other backup officers arrived at the scene, the suitcases were removed from the vehicle and reloaded onto the baggage cart, and the defendants were taken into custody and removed to the Customs enclosure area in the center of the airport. Tapia explained that the suitcases he had received were to be delivered to a man close to the airport.

Co-defendant Edwards testified that he had been approached at an Eastern Airlines carousel by a man who said, "Take these bags and give them to that man across the street." The man to whom he referred was the Petitioner who Edwards testified he had never seen before.

REASON FOR GRANTING THE WRIT

The decision below represents a departure by the Eleventh Circuit Court of Appeals from the sacrosanct reasonable doubt standard and presents an important question of federal law regarding whether, even under arguably suspicious circumstances, proof of a defendant's receipt of contraband in an opaque container is sufficient to establish beyond a reasonable doubt the defendant's criminal knowledge that the container contained contraband.

The decision of the Eleventh Circuit Court of Appeals affirming the Petitioner's conviction for possession of cocaine defies the established precedent of this Court and effectively eliminates a "lack of knowledge" defense in a criminal possession prosecution. For all intents and purposes, the court's decision forecloses the possibility of reversal on appeal in response to a challenge to the sufficiency of the evidence in any case where an accused is in actual possession

of contraband, whether knowingly or not. It is the ultimate and unfortunate extension of the recent trend in narcotics cases to uphold any construction of the evidence by a jury, whether or not that evidence proves guilt beyond a reasonable doubt, unless it is utterly contrary to the record. It thereby seriously jeopardizes the heretofore inviolate reasonable doubt standard.

As Justice Stewart in Jackson v. Virginia, 443 U.S. 307, 323-324 (1979), observed:

> The constitutional necessity of proof beyond a reasonable doubt is not confined to those defendants who are morally blameless. Under our system of criminal justice even a thief is entitled to complain that he has been unconstitutionally convicted and imprisoned as a burglar. [Citation omitted.]

The doctrine that evidence must be sufficient to prove that a defendant is guilty beyond a reasonable doubt has in recent years become somewhat more elastic.

Indeed, in deciding claims of insufficient evidence, courts no longer must assure themselves that the evidence excludes every reasonable hypothesis of innocence. United States v. Bell, 678 F.2d 547, 549 (5th Cir. Unit B 1982) (en banc), aff'd on other grounds, ___ U.S. ___, 103 S.Ct. 2398, 76 L.Ed.2d 638 (1983). That does not mean, however, that juries can convict on the basis of mere suspicion or upon the barest of circumstantial evidence that can be squared with endless hypotheses of innocence. The doctrine of proof beyond a reasonable doubt, though of ancient vintage, has not yet been discarded. The government must still be put to its constitutionally mandated task.

The general legal authority on the subject of evidentiary sufficiency is well settled. In every criminal prosecution, the government must prove every element of the offense charged beyond a reasonable doubt.

Jackson v. Virginia, supra; Patterson v. New York, 432 U.S. 197 (1977); Moore v. United States, 429 U.S. 20 (1976); Estelle v. Williams, 425 U.S. 501 (1976); and In Re Winship, 397 U.S. 358 (1970).

In these cases each mention by the Eleventh Circuit of the Government's burden of proof and the issue on appeal is phrased in such a way as to seemingly eliminate the requirement of proof beyond a reasonable doubt. It first described the issue presented by the Petitioner:

> Specifically, Tapia contends that the government failed to produce any evidence from which the jury could reasonably infer that he intentionally and knowingly possessed the cocaine. [Appendix at p. 8.]

The critical standard, seemingly overlooked by the court, is that a reasonable inference is not enough. Whatever inference is supported by the record, even if reasonable, must constitute proof beyond a reasonable

doubt. While it may not necessarily exclude every reasonable hypothesis of innocence or be wholly inconsistent with every conclusion except that of guilt, it must nevertheless rise to the level of proof beyond a reasonable doubt.

The Circuit Court of Appeals restated the Petitioner's argument:

> Without such [direct] evidence, Tapia argues, the jury could not have reasonably concluded that he intentionally and knowingly possessed the cocaine. [Appendix at pp. 8-9.]

Again, the court neglected to mention the burden of proof and subtly, but significantly, misconstrued the argument. Tapia has never contended that direct evidence is necessary to prove him guilty. His contention is, and has been, that whatever direct and indirect evidence the Government presented, and no matter what reasonable inferences the jury may have

drawn, the evidence was insufficient to establish his guilt beyond a reasonable doubt.

It is settled law that the offense of possession of a controlled substance is a specific intent crime requiring proof of knowledge of the presence of the contraband in addition to an ability to control it and an intention to distribute it. United States v. Vera, 701 F.2d 1349 (11th Cir. 1983). To sustain a conviction, the government must prove the defendant had the requisite criminal intent to commit the crime. United States v. Schwartz, 666 F.2d 461 (11th Cir. 1982). Because the evidence adduced by the Government did not prove the Petitioner's knowledge or intent beyond a reasonable doubt, the decision of the court here also flies in the face of the established precedent of the Fifth Circuit Court of Appeals. In United States v.

Pruett, 551 F.2d 1365 (5th Cir. 1977), for example, the Fifth Circuit reversed a conviction for importation, as well as possession, under facts materially indistinguishable from those in the instant case. In Pruett, supra, a parcel was received at the United States Post Office in Miami, Florida addressed to Mrs. G.L. Pruett. The return address read "Bogota, Colombia." A notice was delivered to the defendant's address indicating that there was a package waiting to be picked up at the post office. Mrs. Pruett, the addressee, removed the notice from her post office box, presented it at the window and received the package. Thereafter, she was followed to her residence where she was observed carrying the package into the house. While subsequently executing a search warrant on the residence, police discovered the package in a downstairs workroom and were unable to tell whether the outer box had been

opened.

Notwithstanding the fact that there were additional facts brought into evidence in the Pruett case, including a transcript of a tape indicating the fact that Mr. Pruett had been engaged in cocaine trafficking only a few months earlier, the Fifth Circuit concluded that there was insufficient evidence to submit to the jury either the question of conspiracy to import cocaine or importation of cocaine or possession with intent to distribute cocaine merely from the fact that an individual received a package containing contraband from a person outside of the United States. The Fifth Circuit rejected the government's suggestion that an agreement could be inferred from the fact that someone, an unknown co-conspirator, mailed a package containing contraband to the defendant. Quoting from its opinion in Causey v. United States, 352 F.2d 203 (5th Cir. 1965), the

court said:

> To establish the intent essential to a conviction for conspiracy the evidence of knowledge must be clear and not equivocal. A suspicion, however strong, is not proof and will not service in lieu of proof. . . . [Id. at 1369.]

The same reasoning applies, of course, to the substantive charge. In rejecting the sufficiency of the evidence as it related to the importation of cocaine, the Fifth Circuit stated that there was no substantive evidence that Mr. Pruett directed the cocaine to be sent or that he had any knowledge of its existence. In concluding that neither Mr. nor Mrs. Pruett had the sufficient knowledge to sustain a conviction for possession with intent to distribute the cocaine in the package, the court stated:

> There is no doubt that Mrs. Pruett had physical possession of the package and the husband was physically present in the residential area where the package was found. There is no evidence that either knew what was in the package

> or, knowing its contents, intended to make it his own. The officer who first retrieved the package at the Pruett home could not say with confidence that the package had, in fact, been opened or that Pruett was aware of its contents. [Id. at 1369.]

The Fifth Circuit again, in United States v. Slater, 524 F.2d 987 (5th Cir. 1975), reiterated the rule that one cannot, absent other facts or circumstances, be charged with knowledge of the contents of a parcel or a letter without opening or examining its contents. The Slater court held that a notice to report for induction into the military sent to the defendant's last known address was insufficient to prove his knowledge of the order to report for induction where the letter was returned unopened to the postal authorities. The same reasoning applies here.

Similarly, in United States v. Franklin, 586 F.2d 560 (5th Cir.), cert. denied, 440

U.S. 972, 99 S.Ct. 1536, 59 L.Ed.2d 789 (1979), the defendant was convicted of both the substantive and conspiracy charges relating to the interstate transportation of stolen goods. Franklin was present at a warehouse where stolen art prints were stored and replied, "Yes," when a co-conspirator asked "if everything was okay." The evidence also established that Franklin helped in loading the stolen prints, which were completely covered in a wrapping material, into the trunk of a co-conspirator's car. On appeal, the Fifth Circuit reversed the conviction holding that the evidence failed to establish that Franklin knew that the contents of the packages were stolen. The same reasoning compels the conclusion that the evidence of Tapia's knowledge of the illicit nature of the luggage he handled is insufficient to establish his guilt beyond a reasonable doubt.

In the case at bar, there was no direct evidence that the Petitioner knew the contents of the suitcases in his possession. The evidence was circumstantial. The unlawful character of the packages within the suitcases was never, in the Petitioner's presence, apparent.[2] There were no fingerprints, no inculpatory statements, no accomplice testimony, no furtive or suspicious movements, no other suspicious evidence consistent with drug trafficking (e.g., test kits, scales, paraphernalia or large sums of money), or any evidence of flight.

It is significant that the same jury which convicted the Petitioner of possession found him not guilty of conspiracy and

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[2]The sighting of football sized, opaque packages through a crack in an opening in one of the suitcases may have constituted a "plain view" sighting sufficient to justify a warrantless search and seizure by trained and experienced police officers, but it does not prove the requisite knowledge on the part of the Petitioner.

acquitted a porter who had at least as much contact with the contraband laden luggage as did the Petitioner.

The facts upon which the Eleventh Circuit Court of Appeals based its decision are not enough to justify the Petitioner's conviction and sentence.[3] The court, however, described the "ample evidence" which it found supported the jury verdict:

> (1) Tapia accepted delivery of suitcases filled with a large quantity of high grade cocaine.
>
> (2) He helped load the cocaine-laden suitcases into his car and told the arresting officers that he planned to deliver them to an unidentified person near the airport. [Appendix at p. 9.]

The trial court concluded, conceding that the evidence was "largely circumstantial":

> Considering the suspicious nature of Tapia's accepting delivery of baggage without presenting claim

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[3]It is notable that nowhere in the Government's appellate brief did it cite a single case where, under similar circumstances, a criminal conviction has been upheld on appeal.

> checks and the unlikely possibility that importers of such a large quantity of high grade cocaine would entrust a mere passerby with the four suitcases, a reasonable juror could infer that Tapia knew the contents of the suitcases and intentionally possessed them. [Appendix at p. 10.]

The "accepted delivery of suitcases," however, is not enough upon which to sustain the Petitioner's conviction. The fact that he "helped load the cocaine-laden suitcases into his car" is similarly not enough. These are the teachings of United States v. Pruett, supra; Causey v. United States, supra; and United States v. Slater, supra. However "unlikely" the "possibility that importers of such a large quantity of high grade cocaine would entrust a mere passerby with the four suitcases," [Appendix at p. 10] it is certainly no less likely than the Petitioner in United States v. Pruett, supra, receiving a package of valuable contraband in the mail. The fact that the Petitioner "told the

arresting officers that he planned to deliver them [the four suitcases] to an unidentified person near the airport," provided no proof of guilty knowledge -- rather, it constituted an immediate, res gestae protestation of innocence. The fact that the suitcases contained "a large quantity" of "high grade" cocaine is irrelevant. Whether the quantity was large or small or whether the cocaine was pure or not is immaterial to the issue of knowledge. What does matter is that the cocaine was not visible, there was no residue, and there was no smell.

Whatever recent judicial trends may have done to diminish the government's burden of proving a criminal defendant's guilt, they have not eliminated the burden of proving an accused guilty beyond a reasonable doubt. Suspicion and even probable cause are insufficient upon which to predicate the criminal convictions of presumptively

innocent defendants charged with serious federal felonies. The Eleventh Circuit Court of Appeals has departed so seriously from the long-established precedent establishing the reasonable doubt standard that this Court's intervention is required to restore uniformity within the federal courts.

CONCLUSION

The decision of the Eleventh Circuit Court of Appeals in this case is in irreconcilable conflict with doctrines long ago established by this Court and, in particular, the line of established precedent represented by United States v. Pruett, supra; Causey v. United States, supra; and United States v. Slater, supra. This case, therefore, cries out for resolution by this Court in order that the viability of the reasonable doubt standard in criminal prosecutions be preserved in the Eleventh Circuit. Certiorari should be granted to

resolve the conflict created by the Eleventh Circuit Court of Appeals and to remedy the injustice suffered by Miguel Tapia.

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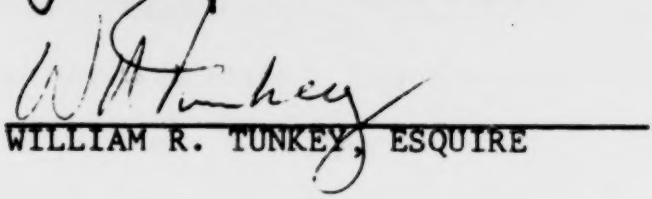

WILLIAM R. TUNKEY, ESQUIRE

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that all parties required to be served herein have been served and further certify that three copies of the foregoing Petition have been served by United States mail this 1st day of November, 1984, upon the Office of the United States Solicitor General, 10th and Constitution Avenue, N.W., Washington, D.C. 20530, and a copy upon Mark Schnapp, Esquire, Office of the United States Attorney, 155 S. Miami Avenue, Miami, Florida 33130.

GEOFFREY C. FLECK, ESQUIRE

APPENDIX

Opinion in the Court Below.

UNITED STATES of America,
Plaintiff-Appellee,

v.

Miguel M. TAPIA,
Defendant-Appellant.

No. 83-5819.

United States Court of Appeals,
Eleventh Circuit.

August 3, 1984.

Appeal from the United States District Court for the Southern District of Florida.

Before HILL, JOHNSON and HENDERSON, Circuit Judges.

PER CURIAM:

At the conclusion of his jury trial, appellant Tapia was convicted of possession with intent to distribute cocaine in violation of 21 U.S.C. § 841(a)(1). By this appeal, Tapia makes two challenges to his

conviction: (1) the evidence used against him derived from an illegal search and (2) insufficient evidence supported the jury's finding that he intentionally possessed the cocaine. We disagree with both contentions and affirm.

The facts leading to Tapia's arrest can be summarized as follows. Customs agents in Miami received a tip from an informant that Tapia was to pick up 80 kilos of cocaine at the Miami International Airport on a certain date at a certain time. According to the informant, the cocaine was to be delivered to Tapia by a porter at the airport. Customs agents set up a surveillance at the airport and soon discovered Tapia waiting near a parking facility just outside one of the airport's concourses. The agents then observed a porter wheel four large suitcases from the same concourse through an unguarded port toward the place where Tapia was

waiting. As the porter approached, Tapia walked over to his car and opened the trunk. The agents watched the two men load the suitcases into the car and then approached. The agents noticed that one of the locks on the fourth suitcase had popped open, exposing a number of football-shaped bundles wrapped in contact paper and grey duct tape. Recognizing the bundles as characteristic of cocaine packaging,[1] the agents arrested Tapia and the porter. Tapia was later charged in a two-count indictment with conspiracy to possess with intent to distribute cocaine and with possession with intent to distribute cocaine. He was acquitted on the conspiracy

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[1]The agents conducted a field test to determine the contents of the packages carried in the four suitcases. Chemical analysis revealed that the packages contained 23 kilograms of 93 percent pure cocaine. To the extent that Tapia challenges the propriety of the field test conducted by the DEA chemist, we note that the Supreme Court recently confirmed the lawfulness of such conduct by law enforcement officers. See United States v. Jacobsen, 52 U.S.L.W. 4414, 4417-18 (U.S. April 2, 1984).

charge but found guilty of possession with intent to distribute.[2]

I

Tapia primarily argues that the district court erred by refusing to suppress the cocaine. After conducting a suppression hearing, at which Tapia testified, the district court suppressed the cocaine seized from three of the suitcases but refused to suppress the cocaine from the suitcase which had popped open while being loaded into Tapia's car. Tapia contends that the district court should have suppressed all of the cocaine. We disagree.

Initially, we question Tapia's standing to challenge the legality of the search and

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[2]The jury acquitted the porter on both counts.

seizure of these suitcases. The luggage carried no identifying tags, nor did Tapia produce any claim checks for the bags. Although he told the arresting officers that he planned to deliver the suitcases to someone near the airport, Tapia disavowed any interest in the luggage when he testified at the suppression hearing. When asked whether the suitcases were in his car when the agents opened them, Tapia testified, "[t]hose suitcases weren't mine, and I don't know about that. I don't know those suitcases." Record on Appeal at 68.

While we do not read Tapia's testimony to indicate an abandonment of all interest in the contents of the suitcases, see United States v. Canady, 615 F.2d 694, 696-97 (5th Cir.) cert. denied, 449 U.S. 862 (1980), his disclaimers tend to negate any legitimate expectation of privacy he might have in the contents of the suitcases. See United

States v. Hawkins, 681 F.2d 1343, 1345-46 (11th Cir.), cert. denied, 103 S. Ct. 354 (1982); United States v. Canady, 615 F.2d at 697 n.2. However, the district court made no express finding as to Tapia's standing to question the search even though Rakas v. Illinois, 439 U.S. 128 (1978), makes clear that the standing issue should not be divorced from the substantive issues underlying the fourth amendment claim. Clearly, "A person challenging the constitutionality of the search must show that he possesses a legitimate expectation of privacy in the premises searched or the items seized." United States v. Rackley, 724 F.2d 1463, 1468 (11th Cir. 1984) (citations

omitted).[3]

Even assuming that Tapia established a legitimate expectation of privacy in the suitcases sufficient to enable him to challenge the search, the district court properly determined that the officers could lawfully seize the cocaine under the "plain view" exception to the warrant requirement. The court found that the suitcase had opened before the officers arrived and that through the opening the officers could see several round packages wrapped in contact paper and

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[3]Thus, we question the propriety of the district court's pretermitting the initial inquiry under Rakas--whether the person challenging the search has shown a legitimate expectation of privacy--where the person's testimony indicates a complete absence of privacy expectation in the items seized. See United States v. Hawkins, 681 F.2d at 1345-46. Had the district court made such a determination, it might well have concluded that Tapia could not challenge the search of any of the suitcases, including the three the contents of which were suppressed. However, the correctness of the decision to suppress the cocaine from the other three suitcases has not been challenged in this court and we see no reason to address it further.

duct tape. The officers testified that, in their experience, cocaine was frequently packaged in similar containers. Further, an informant had identified the suitcases as containing cocaine. Under these circumstances, the officers' actions were reasonable; the cocaine, appearing in plain view, could be seized without a warrant. See Texas v. Brown, 103 S. Ct. 1535 (1983).

II

Tapia also challenges the sufficiency of the evidence to support his conviction. Specifically, Tapia contends that the government failed to produce any evidence from which the jury could reasonably infer that he intentionally and knowingly possessed the cocaine. He emphasizes that no direct evidence indicated his knowledge of the contents of the suitcases, that no

fingerprints were found on the packages, that no inculpatory statements were given to the officers, and that no drug paraphernalia was found in his possession. Without such evidence, Tapia argues, the jury could not have reasonably concluded that he intentionally and knowingly possessed the cocaine. Again, we disagree.

Reviewing the evidence and all reasonable inferences to be drawn from the evidence in the light most favorable to the government, Glasser v. United States, 315 U.S. 60, 80 (1942), we conclude that ample evidence supports the jury verdict. Tapia accepted delivery of suitcases filled with a large quantity of high grade cocaine. He helped load the cocaine-laden suitcases into his car and told the arresting officers that he planned to deliver them to an unidentified person near the airport. Whether Tapia remained "intentionally ignorant" of the

contents of the suitcases, or whether Tapia actually knew that he was to transport cocaine, was a question that could only be answered based on the reasonable inferences to be drawn from the evidence produced at trial. Considering the suspicious nature of Tapia's accepting delivery of baggage without presenting claim checks and the unlikely possibility that importers of such a large quantity of high grade cocaine would entrust a mere passerby with the four suitcases, a reasonable juror could infer that Tapia knew the contents of the suitcases and intentionally possessed them. The evidence, albeit largely circumstantial, was sufficient to support the jury's verdict.

For these reasons, we AFFIRM.